Supreme Court, U.S.
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No. 92-1519

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHRIS E. COSNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

THEODORE G. HESS
Colonel, USMC

LAURA L. SCUDDER
Major, U.S. Marine Corps
Appellate Government Counsel
Appellate Government Division, NAMARA
Washington, D.C. 20374-1111

QUESTIONS PRESENTED

1. Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocate General to select commissioned officers in the military as court-martial trial judges and judges of the courts of military review.

2. Whether due process requires that military judges have fixed terms of office.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-9a, is reported at 35 M.J. 278. The opinion of the Navy-Marine Corps Court of Military Review, Pet. App. 10a-15a, is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 24, 1992. A request for reconsideration was denied on December 18, 1992. Pet. App. 16a. The petition for a writ of certiorari was filed on March 18, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a member of the United States Marine Corps, pleaded guilty to two counts of rape, two counts of forcible sodomy, obstruction of justice, kidnapping, and assault with intent to commit murder, in violation of Articles 120, 125, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920, 925, and 934. Petitioner was sentenced to confinement for 65 years, a dishonorable discharge, forfeiture of all pay and allowances, and reduction to the lowest enlisted pay grade. The convening authority approved the findings and sentence and suspended all confinement in excess of 25 years, pursuant to the terms of a pretrial agreement. The Navy-Marine Corps Court of Military Review affirmed the findings and sentence, with the exception of the obstruction of justice count, which was modified to one count of communicating a threat to kill. The Court of Military Appeals granted petitioner's request for review on several issues not presented in the certiorari petition, see Pet. App. 2a-3a n.1, 5a, and affirmed the judgment of the court of military review.

ARGUMENT

Petitioner presents two claims. First, he argues that the military trial and appellate judges in his case were not qualified to hold those positions because they were appointed to them by the Judge Advocate General of the Navy in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. Second, he claims that his trial and his appeal to the court of military review were fundamentally unfair because the military judges sitting on those courts do not

enjoy a fixed term of office and can be reassigned to other military duties by the Judge Advocate General based on his evaluation of their performance as judges. Neither claim warrants review by this Court.

1. Petitioner has not properly preserved his claims for review by this Court. Petitioner did not raise either claim with regard to the trial judge at or before trial and therefore has waived them under the rules of military procedure. See Rule for Courts-Martial 905(e), *Manual for Courts-Martial, United States —1984*, at II-109.[1] In addition, petitioner did not raise in the court of military review or the Court of Military Appeals any claim challenging the qualifications of the trial judge or the judges of the court of military review. Finally, no military court addressed those claims. Petitioner therefore cannot raise those claims for the first time in this Court. See, *e.g.*, *Taylor* v. *Freeland & Kronz*, 112 S. Ct. 1644, 1649 (1992) ("[o]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s].")

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[1] Rule 905(e) provides as follows:

> Failure by a party to raise defenses or objections or to make requests which must be made before pleas are entered under subsection (b) of this rule shall constitute waiver. The military judge for good cause shown may grant relief from the waiver. Other requests, defenses, or objections, except lack of jurisdiction or failure of a charge to allege an offense, must be raised before the court-martial is finally adjourned for that case and, unless otherwise provided in this Manual, failure to do so shall constitute waiver.

(quoting *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976); *Solorio* v. *United States*, 483 U.S. 435, 451 n.18 (1987).[2]

2. On the merits, petitioner's claims are not materially different from the claims raised by the petitioners in *Graf* v. *United States*, No. 92-1102, and *Weiss* v. *United States*, No. 92-1482. We have already responded to those claims in our briefs in opposition in those cases. We rely on those responses here.[3]

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[2] The Court of Military Appeals did not grant review on these questions. Accordingly, it is not clear that they are subject to review by certiorari in this Court. The statutes providing for certiorari review of the judgments of the Court of Military Appeals, 10 U.S.C. 867a(a) and 28 U.S.C. 1259(3) (1988 & Supp. III 1991), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Article 67a(a), UCMJ, 10 U.S.C. 867a(a), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory authority to limit its decisions in any case to less than all the issues urged by the accused. Art. 67(c), UCMJ, 10 U.S.C. 867(c) (Supp. III 1991). Since petitioner did not raise these issues for review by the Court of Military Appeals, there is a question whether that court rendered a "[d]ecision" on the issues that petitioner presents in his petition. For the reasons given in the text, however, it is unnecessary to answer that question in this case, since the questions presented in the certiorari petition do not warrant review by this Court in any event.

[3] We have supplied petitioner's counsel with a copy of our briefs in opposition in *Graf* and *Weiss*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

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Colonel, USMC

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Major, U.S. Marine Corps
Appellate Government Counsel
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NAMARA

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